UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 01-11377-GAO

THE UNITED STATES ex rel. ISAACSON STEEL, INC.,
Plaintiff

v.

METHUEN CONSTRUCTION CO., INC.,
TRI STATE IRON WORKS, INC., and
UNITED STATES FIDELITY & GUARANTY COMPANY, INC.,
Defendants

MEMORANDUM AND ORDER
February 27, 2004

O'TOOLE, D.J.

Plaintiff Isaacson Steel, Inc.'s ("Isaacson") Motion for Partial Summary Judgment (dkt. no. 25) is GRANTED as to Counts III and IV of the complaint, but DENIED as to Counts I and II of the complaint for the following reasons.

Defendant Tri State Iron Works, Inc. ("Tri State") does not dispute that (i) in mid-2000, Isaacson was contacted by Tri State and asked to provide Tri State with structural steel and related materials in connection with the construction of a new base building, airport traffic control tower and control cab at Hanscom Field in Bedford, Massachusetts (the "Project"); (ii) Isaacson, Tri State and Methuen Construction Co., Inc. ("Methuen"), the general contractor on the Project, entered into a Joint Check Agreement, in which Methuen agreed to issue a joint check payable to Tri State and Isaacson for materials supplied for the Project (the "Joint Check Agreement"); (iii) Isaacson furnished materials to Tri State through August 2000; (iv) the steel and materials Isaacson supplied to Tri State had a fair and reasonable value of $48,436.45; (v) Isaacson issued invoices to Tri State

totaling $48,436.45 for the materials it supplied, but (vi) Tri State has not paid any of the invoices and Isaacson is entitled to payment. As there are no genuine issues of material fact, Isaacson is entitled to judgment as a matter of law on its claims against Tri State for breach of contract (Count III) and quantum meruit (Count IV).

Isaacson is not, however, entitled to summary judgment on its Miller Act claims against Methuen and its surety, United States Fidelity & Guaranty Company ("USF&G"), (Counts I and II, respectively), because Tri State was a material supplier and not a subcontractor to Methuen on the Project.

The Miller Act provides, in pertinent part:

> (b) Right to bring a civil action.
>
> (1) In general – Every person that has furnished labor or material in carrying out work provided for in a contract for which a payment bond is furnished under section 3131 of this title and that has not been paid in full within 90 days after the day on which the person did or performed the last of the labor or furnished or supplied the material for which the claim is made may bring a civil action on the payment bond for the amount unpaid at the time the civil action is brought and may prosecute the action to final execution and judgment for the amount due.
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> (2) Person having direct contractual relationship with a subcontractor – A person having a direct contractual relationship with a subcontractor but no contractual relationship, express or implied, with the contractor furnishing the payment bond may bring a civil action on the payment bond on giving written notice to the contractor within 90 days from the date on which the person did or performed the last of the labor or furnished or supplied the last of the material for which the claim is made. The action must state with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed.

40 U.S.C. § 3133(b) (2003) (formerly 40 U.S.C. § 270b(a)). "The Supreme Court has interpreted this provision to preclude recovery on the payment bond by anyone whose relationship to the general

contractor is more remote than a second-tier subcontractor." United States ex rel. Water Works Supply Corp. v. George Hyman Constr. Co., 131 F.3d 28, 31 (1st Cir. 1997) (citing J.W. Bateson Co. v. United States ex rel. Bd. of Trustees of the Nat'l Automatic Sprinkler Indus. Pension Fund, 434 U.S. 586, 590-91 (1978) and MacEvoy Co. v. United States ex rel. Calvin Tomkins Co., 322 U.S. 102, 107 (1944)). In other words, the Miller Act claimant must have a "direct contractual relationship" either with the general contractor or with a direct subcontractor. George Hyman, 131 F.3d at 31, 35. Accordingly, Isaacson's right to recover on its Miller Act claims turns on whether Tri State was a subcontractor or a materialman of Methuen.[1]

To determine if a party is a subcontractor or a materialman, courts examine the "substantiality and importance" of the party's relationship with the prime contractor. F.D. Rich Co. v. United States ex rel. Indus. Lumber Co., 417 U.S. 116, 123 (1974). "It is the substantiality of the relationship which will usually determine whether the prime contractor can protect himself, since he can easily require bond security or other protection from those few 'subcontractors' with whom he has a substantial relationship in the performance of the contract." Id. at 123-24. Thus, the Court must analyze the total relationship between Tri State and Methuen to determine whether Tri State was a subcontractor. Courts have applied various factors to aid in this analysis. See e.g., United States ex rel. Conveyor Rental & Sales Co. v. Aetna Casualty & Surety Co., 981 F.2d 448, 451-52 (9th Cir. 1992) (collecting cases). These factors should not be applied in a vacuum, but should be considered in light of the overall substantiality and importance of the parties' relationship and the remedial nature of the Miller Act. See MacEvoy, 322 U.S. at 107 ("The Miller Act . . . is highly remedial in nature. It is entitled to a liberal construction and application in order properly to

[1] The parties do not dispute the sufficiency or timeliness of Isaacson's notice to Methuen and USF&G of its claim on the bond.

effectuate the Congressional intent to protect those whose labor and materials go into public projects.").

Here, certain factors weigh in favor of finding a subcontractor relationship. First, the Joint Check Agreement form refers to the contract between Tri State and Methuen as a "Subcontract;" second, the contract called for Tri State to submit shop drawings to Methuen for approval; third, a substantial amount, if not all, of the materials Tri State supplied did not come from its own existing inventory, as evidenced by the contract Tri State had with Isaacson; fourth, Tri State did some custom fabrication of the structural steel supplied for the Project in accordance with the prime contract drawings and specifications; and lastly, Methuen is backcharging Tri State for the cost of correcting work.

However, on balance, other factors weigh more heavily in favor of finding a materialman relationship. First, the written contract between Methuen and Tri State is a "Purchase Order," referring to Methuen as the "Buyer" and Tri State as the "Vendor," not a standard subcontract; second, the Purchase Order accounts for only about 6.4% of the total contract price of $5,238,962; third, the Purchase Order called for Methuen to pay any applicable sales tax on the materials supplied, as a buyer normally would; fourth, Tri State did not contract to provide labor in addition to materials and all steel erection was performed by Methuen; fifth, while the Purchase Order required Tri State to provide on-site support during the steel erection to minimize the impact of any fabrication errors, this appears to allow for any necessary repairs to fabrication work previously performed by Tri State in its own shop; sixth, the materials supplied by Tri State did not constitute a particularly complex integrated system; seventh, Tri State was not required by Methuen to secure a subcontractor's payment or performance bond for its work on the Project; and finally, there is no evidence of a close financial relationship between Tri State and Methuen, as this appears to be the

first project that Tri State and Methuen worked on together.

These latter considerations lend the Court to conclude that Tri State did not have the kind of relationship with Methuen in the performance of its contract for the Project that made it a "subcontractor" so as to allow Isaacson to maintain Miller Act claims against Methuen and USF&G. Isaacson's motion for partial summary judgment is therefore denied as to Counts I and II of its complaint.

It is SO ORDERED.

February 27, 2004
DATE

\s\ George A. O'Toole, Jr.
DISTRICT JUDGE